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No. 06-8120

IN THE

Supreme Court of the United States

BRUCE EDWARD BRENDLIN

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of California

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent's arguments in defense of the California Supreme Court's novel and result-driven test for seizure rely upon untenable extensions and unsupported reconstructions of this Court's precedents. First, Respondent reads *Brower* v. *County of Inyo* to suggest that only the singular "object" of the officer's show of authority (which Respondent assumes to be the driver in all cases) is seized. Second, Respondent uses *Florida* v. *Bostick* and *California* v. *Hodari D.* – two cases that expressly turn on the *absence* of either acquiescence to or the existence of an officer's "show of authority" and a resulting deprivation of liberty and privacy interests – to argue that Petitioner was not seized when the Deputy Sheriff pulled over the car in which Petitioner was riding. Finally, Respondent would vitiate the Court's holding in *Hudson* v. *Michigan* in order to argue yet another novel proposition of law; namely, that an unlawful seizure is, in all cases, of no moment where the person seized is subject to arrest on an outstanding warrant.

None of Respondent's multiple fallback positions or novel constructions of this Court's precedents are consistent with established principles of Fourth Amendment law or even sound policy. For this reason, and others left unaddressed by Respondent, the Court should reject Respondent's arguments and vacate the California Supreme Court's decision.

I. THIS COURT SHOULD DECLINE RESPONDENT'S INVITATION TO "EXTEND" THE COURT'S PRECEDENTS TO FOCUS EXCLUSIVELY ON THE SUBJECTIVE INTENT OF THE DETAINING OFFICER.

1. For the Court to find in Respondent's favor, it must conclude, *inter alia*, that despite police conduct resulting in the actual detention of multiple individuals, only the individual targeted by a police officer may be considered "seized" for Fourth Amendment purposes. Respondent

expressly asks the Court to "extend[]" the holding of *Brower* v. *City of Inyo*, 489 U.S. 593 (1989), from a requirement that government action must be purposeful in order to constitute a seizure (*i.e.*, the officer must intend to do the act leading to the detention) to one that mandates that a seizure occurs only when the specific person whom the officer seeks to apprehend is detained. See Resp. Br. 11. This requested extension not only far exceeds any of this Court's related decisions on the matter,[1] but also runs counter to much of this Court's Fourth Amendment jurisprudence and makes little sense as a matter of practice.

First, *Brower* is an inappropriate springboard for Respondent's position. In *Brower*, the petitioner's decedent in a civil action under 42 U.S.C. § 1983 (1979) died as a result of a roadblock set up to impede his further progress during a police pursuit. This Court held that as a result of the collision, the deceased driver was "seized" within the meaning of the Fourth Amendment. *Brower*, 489 U.S. at 599. In so holding, the Court asserted that "a Fourth Amendment seizure" occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied.*" *Id.* at 596-97 (emphasis in original). Respondent claims that based on *Brower*, it "makes sense to recognize that a 'seizure' requires not merely that the police conduct is undertaken deliberately but also that it is directed at a particular person." Resp. Br. 12. For support, Respondent cites a passage in which the Court states that "'[i]t was enough therefore, that . . . Brower was meant to be stopped by the physical obstacle of the roadblock and that he was so stopped.'" *Id.* (quoting *Brower*, 489 U.S. at 599). Respondent reads this statement with emphasis on "Brower"

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[1] *See* Pet. Br. 10-13. The only support from this Court that Respondent can muster for its position (without seeking an "extension" of the Court's Fourth Amendment doctrine) comes from a dissenting opinion in *Maryland* v. *Wilson*, 519 U.S. 408, 420 (1997) (Stevens, J., dissenting). *See* Resp. Br. 13, 14, 20, 29.

rather than "meant to be stopped." But *Brower*'s analysis concerned whether the police officers' actions as a general matter were purposeful, distinguishing them from a situation where an individual's freedom of movement is restricted accidentally.[2] See, *e.g.*, *County of Sacramento* v. *Lewis*, 523 U.S. 833, 844 (1998) (police car inadvertently struck passenger on motorcycle who had fallen off during high-speed chase). Thus *Brower* offers no comment about the relevance, if any, of *who* specifically was the target of the roadblock and it defies logic to suggest, as Respondent's position necessarily does, that a passenger in Brower's vehicle would not also have been seized and therefore would have had no predicate for a § 1983 action.

Respondent's misconstruction of the *Brower* rationale is underscored by the holding in *County of Sacramento* v. *Lewis*, in which this Court applied the test from *Brower* to reach the opposite conclusion. In *Brower*, the Court found that a detention had occurred because the driver had in fact been stopped by the very instrumentality put in place to detain him. 489 U.S. at 596. In *Lewis*, by contrast, the Court found that no seizure occurred when an officer pursuing a fleeing motorcycle accidentally ran over a passenger who had fallen off the back of the motorcycle. *Lewis*, 523 U.S. at 844. This determination was not, however, based on the fact that the officer's show of authority was directed at the driver and it

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[2] Respondent mistakenly equates "incidental" interferences with liberty with those that are "accidental." *See* Resp. Br. 12. According to Respondent, both are simply "'unintended consequence[s] of government action.'" *Id.* (quoting *Brower*, 489 U.S. at 596). This understanding is erroneous, however, as incidental intrusions are often anticipated (*i.e.*, intended), while accidental intrusions are, by definition, "[n]ot . . . purposeful." *Black's Law Dictionary* 16 (8th ed. 2004). Thus, for purposes of determining whether a seizure has occurred, it is of no moment that an intrusion – in this case a restriction on an individual's personal liberty – may be deemed "incidental"; unlike most accidental intrusions, *see, e.g.*, *County of Sacramento* v. *Lewis*, 523 U.S. 833, 844 (1998), an incidental intrusion retains its character as a seizure.

was a passenger rather than a driver who was struck by the officer, but rather on the fact that the officer had not terminated the passenger's movement by "means intentionally applied." *Id.* As the Court explained in *Brower*, it is the police *action* that must be intentional; a seizure may occur even when an unintended person or thing is the subject of the detention, but no seizure will occur unless the detention is the result of intentional police conduct. 489 U.S. at 596.

Second, Respondent's hypotheticals do not support its desired extension of the holding in *Brower*. Respondent asserts that Petitioner's position – that a passenger is seized when pulled over by the police – logically implies that a seizure also occurs where a police officer stops one car on a one-lane road, but also therefore interferes with the movement of a second car trailing the stop. Resp. Br. 8. This suggestion highlights Respondent's fundamental misunderstanding of Petitioner's position and the state of the law. When a car has been pulled over, all of the occupants are now subject – at one level or another – to the authority of the police officer and to other, important operations of law. Pet. Br. 24-26. The stopped car behind them, by contrast, may be inconvenienced, but its occupants are subject only to the intrusion of not being able to go forward. Unlike the occupants in the car seized, however, the idle occupants of the following car are not subject to any examination or scrutiny by the police, and thus their "sense of security and privacy in traveling in an automobile," *Delaware* v. *Prouse*, 440 U.S. 648, 662 (1979), is in no way compromised.

Third, although Respondent appears to extrapolate its recommended standard from *Brower*, the test bears a striking resemblance to the "target theory" rejected by this Court in *Rakas* v. *Illinois*, 439 U.S. 128, 132-33 (1978). The "target theory" or "object" theory, as Respondent describes it, see Resp. Br. 9, 12, looks to whether the aggrieved party was the object of the attempted seizure to determine whether his or her Fourth Amendment rights have been implicated at all.

Such a theory focuses on the subjective intentions of the officers rather than on the objective observations and impressions of the person claiming a violation of Fourth Amendment rights. Nowhere in this Court's cases addressing the "reasonable person" standard of Fourth Amendment seizures is there any indication that the officer's intent to cause a reasonable person to believe that he or she is not free to terminate the encounter is even relevant to the discussion. On the contrary, the Court has emphasized that the inquiry is an objective one and focuses solely on the potentially aggrieved party; a seizure occurs when a reasonable person would not feel free "to disregard the police and go about his business," *California* v. *Hodari D.*, 499 U.S. 621, 628 (1991), or when a reasonable person would not "feel free to decline the officers' requests or otherwise terminate the encounter." *Florida* v. *Bostick*, 501 U.S. 429, 436 (1991).

In *Rakas*, the defendants were passengers in a car that was lawfully stopped by police. The defendants sought to suppress evidence seized during an allegedly unreasonable search of the vehicle on the ground that they were "targets" of the search. The Court rejected the defendants' proposed rule of Fourth Amendment "standing," a rule that would permit any criminal defendant at whom a search was "directed" to challenge that search. *Rakas*, 439 U.S. at 132. In rejecting this so-called "target theory," the Court noted its earlier statement in *Jones* v. *United States*:

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.

362 U.S. 257, 261 (1960). The *Rakas* court clarified, however, that the "directed" language in *Jones* merely served as a "parenthetical equivalent" to the phrase "a victim of a

search or seizure." *Rakas*, 439 U.S. at 135. The Court went on to explicitly disavow any broader reading of the term. *Id.* Thus, just as the Court in *Rakas* rejected the "target theory" to the extent that it would broaden the rights of those seeking to suppress seized evidence, this Court should reject Respondent's attempt to revive that doctrine in this case in order to narrow the rights of those who, unlike Petitioners in *Rakas*, are unlawfully seized.

The "target" or "object" doctrine has also been foreclosed by this Court on a number of occasions beyond *Rakas*, dating back to *Alderman* v. *United States*, 394 U.S. 165 (1969). In *Alderman*, this Court determined that an absent party had "standing" to object to the use of electronic surveillance conducted inside his home, whether or not he was present at the time of the surveillance or participated in the intercepted conversations. The *Alderman* decision included the same "directed at" language used by the Court earlier in *Jones,* but in *Alderman* the Court made clear that the "directed at" rationale meant simply that the person seeking to exclude evidence have experienced an invasion of his or her privacy. *Id.* at 173-74. Although the Court once again declined to adopt a broad rule that would permit any party to exclude illegally seized evidence regardless of whether that party's personal constitutional rights were violated by the search, the Court emphasized the "substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion." *Id.* at 174. In other words, the crucial question is whether the party seeking to suppress evidence was subjected to an illegal search or detention, not whether that party was the "object" of the police action. Cf. *id.* at 176-77.

Although the context in *Alderman* is quite different from the one in this case, the Court's review of *Alderman* in *Rakas* reveals the flaws in Respondent's proffered approach to

determining when a person has been seized under the Fourth Amendment. Specifically, the *Rakas* Court quoted with approval the concurring and dissenting opinion of Justice Harlan, which addressed in some detail the difficulties presented by the proposed "target theory":

> [The] [target] rule would entail very substantial administrative difficulties. In the majority of cases, I would imagine that the police plant a bug with the expectation that it may well produce leads to a large number of crimes. A lengthy hearing would, then, appear to be necessary in order to determine whether the police knew of an accused's criminal activity at the time the bug was planted and whether the police decision to plant a bug was motivated by an effort to obtain information against the accused or some other individual.

Rakas, 439 U.S. at 136-37 (quoting *Alderman*, 394 U.S. at 188-89 n.1 (Harlan, J., concurring in part and dissenting in part)) (alteration in *Rakas*). The very same concern applies in this context. In order to determine whether a passenger's Fourth Amendment rights have been implicated by a traffic stop, Respondent's approach would require an examination of the officer's subjective intentions in stopping the vehicle, his awareness of the passenger's presence, and what role the passenger's actions played in the officer's decision to stop the car. Such an approach would represent a complete break from this Court's consistent emphasis on applying a strictly objective standard to determine when a seizure has occurred.

2. Even beyond the relevant case law, as a practical matter when an officer signals to the driver of a car to pull to the side of the road, neither the driver nor the occupants knows at that moment who or what is the object of the officer's suspicion.[3]

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[3] In fact, it may be unclear to the officer herself who is responsible for the apparent violation.

Here, for example, the Deputy could have spotted Petitioner in the passenger's seat, recognized him as the subject of an outstanding warrant, and then pulled over the car. From this perspective, each of the vehicle's occupants is potentially the object of the officer's authority.

Similarly, even if the officer has targeted a passenger for an alleged violation, there is simply no way the officer could seize only that passenger.[4] It is unclear exactly how Respondent would analyze this highly plausible scenario. Is

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[4] Respondent's claim that "there is no reason for anyone present to assume that the initial police action is directed at anyone other than the driver," Resp. Br. 19, flies in the face of California law itself. Police may effect a traffic stop based solely upon the conduct of a *passenger*. California's vehicle code is replete with laws directed at either the driver or the passenger. *See, e.g.*, Cal. Veh. Code § 21712(b) (2007) ("A person shall not ride on a vehicle or upon a portion of a vehicle that is not designed or intended for the use of passengers."); § 23111 ("No person in any vehicle . . . shall throw or discharge from or upon any road or highway or adjoining area, public or private, any lighted or nonlighted cigarette, cigar, match, or any flaming or glowing substance."); § 23112(a) ("No person shall throw or deposit... upon any highway . . . any substance likely to injure or damage traffic using the highway, or any noisome, nauseous, or offensive matter of any kind."); § 23116(b) ("No person shall ride in or on the back of a truck or flatbed motortruck being driven on a highway."); § 23221(b) ("No passenger shall drink any alcoholic beverage while in a motor vehicle upon a highway."); § 23223(b) ("No passenger shall have in his or her possession, while in a motor vehicle upon a highway or on lands . . . any bottle, can, or other receptacle containing any alcoholic beverage that has been opened or a seal broken, or the contents of which have been partially removed."); § 23224(b) ("No passenger in any motor vehicle who is under the age of 21 years shall knowingly possess or have under that person's control any alcoholic beverage."); § 23226(b) ("It is unlawful for any passenger to keep in the passenger compartment of a motor vehicle, when the vehicle is upon any highway . . . any bottle, can, or other receptacle containing any alcoholic beverage that has been opened or a seal broken, or the contents of which have been partially removed."); § 27315(e) ("A person 16 years of age or over may not be a passenger in a motor vehicle on a highway unless that person is properly restrained by a safety belt.").

only the passenger seized despite the officer's signal to the driver to pull off the road? Are both the driver and targeted passenger seized, but for different purposes? These ambiguities in Respondent's theory demonstrate its ultimate unsoundness. In sum, the most appropriate and practical view is that both the driver and any passengers are seized when subject to the authority of a police officer during a traffic stop.

II. *BOSTICK* AND *HODARI D.* ARE INAPPOSITE IN THE CONTEXT OF AN OCCUPANT OF A VEHICLE THAT HAS BEEN PULLED OVER BY AN OFFICER'S SHOW OF AUTHORITY.

1. Respondent's attempt to analogize this case to *Florida* v. *Bostick* is unavailing. *Bostick* concerned the claim of a passenger on an idle commercial bus that he was "seized" as a result of the actions of two county police officers who boarded the bus in order to obtain passengers' consent to search luggage in the course of an illegal drug investigation. For several reasons, *Bostick* does not apply to the facts of this case. Most notably, *Bostick* "did not present a situation in which the individual's 'freedom of action' had been curtailed in the first place."[5] Pet. Br. 23. In other words, whereas in *Bostick* the defendant passenger was simply waiting on an idle bus that had yet to depart, here Petitioner's vehicle was physically pulled over by the police in the course of transit. The result is that in this case, Petitioner was seized at the moment he was pulled over, while the passenger in *Bostick* was never so detained (and in fact was informed that he was free to decline the officers' requests for cooperation, see *Bostick*, 501 U.S. at 432).

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[5] *Bostick* is distinguishable for the additional reason that the Court found that the officers boarded such buses on a regular basis and did not act in a threatening manner. 501 U.S. at 431-32. Respondent in *Bostick* did not therefore acquiesce to a show of authority, only to an officer's request.

In challenging this argument, Respondent claims that the Deputy did not use "force to impede a citizen's movements." Resp. Br. 22. Respondent bases this contention on an irrelevant distinction drawn in *Brower* between police pursuit by flashing lights and the use of a roadblock. See *id.* (citing *Brower*, 489 U.S. at 598). There the Court stated: "In marked contrast to a police car pursuing with flashing lights or to a policeman in the road signaling an oncoming car to halt, a roadblock is not just a *significant show of authority* to induce a voluntary stop." *Id.* (citing *Brower*, 489 U.S. at 598) (emphasis in Resp. Br.) But the reference to a "significant show of authority" was merely to the *pursuit* undertaken by a police officer, and not an instance where the pursued vehicle in fact pulls over as a result of that show of authority (as happened here). The cited passage merely confirmed what is now well-established law, namely that pursuit alone does not constitute a seizure (*i.e.*, pursuit is not the equivalent of impeding a citizen's movements). See *Hodari D.*, 499 U.S. at 628-29.

Moreover, in this case, the Deputy testified that in order to effectuate the traffic stop, he turned on his overhead lights and kept them on for the duration of the stop. JA 50. This Court has consistently held that stopping an automobile constitutes a seizure within the meaning of the Fourth Amendment, no matter how limited the purposes of the stop or how brief the duration of the detention. *Prouse*, 440 U.S. at 653. The Court has also acknowledged that "few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so." *Berkemer* v. *McCarty*, 468 U.S. 420, 436 (1984). Indeed, as Respondent acknowledges, the California Vehicle Code makes it a crime to ignore an officer's signal to pull over. Resp. Br. 19; Cal. Veh. Code §§ 2800 (2006), 2800.1 (2007). Under no reasonable interpretation of the facts may this unjustified traffic stop be likened to a "consensual" police encounter.

While it is true that both *Bostick* and the case at bar involve – to some degree – modes of transportation, the defendant's presence on a bus in *Bostick* was irrelevant because the bus was stationary and had not yet begun its journey. Thus, when the officers initially boarded the bus to question the passengers, there was a genuine question as to whether a reasonable person in the defendant's position would have felt free to leave. He had yet to be subjected necessarily to a sufficient show of authority. This circumstance in no way resembles the current situation, where the officer's show of authority required – under California law – the occupants in the vehicle to cease their journey.

Like the California Supreme Court in its opinion below, Respondent posits a slippery slope in which a finding that Petitioner was detained in this case would lead to a conclusion that "all taxi cab and bus passengers would be 'seized' under the Fourth Amendment when the cab or bus driver is pulled over by police for running a red light." Resp. Br. 23; see also *People* v. *Brendlin*, 136 P.3d 845, 850-51 (Cal. 2006) (JA 121-25). This hypothetical is unpersuasive for three reasons.[6] First, passengers of a common carrier – such as a bus or taxi – pulled over by the police are generally not in a relationship to the driver (or perhaps even to another passenger sought by the police) analogous to that of passengers and drivers in a private vehicle. As a result, it is far less likely in the common carrier context that the passengers are either a threat to officer safety or related in any way to the potentially unlawful behavior at issue. Cf. *Maryland* v. *Wilson*, 519 U.S. 408, 413-14 (1997). Second, and not unrelated, a passenger riding in a bus or taxi stopped by police based on driver conduct is not subject to the same

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[6] Significantly, under the circumstances described by Respondent (running a red light), any detention of bus or taxi passengers would undoubtedly be a reasonable detention because the traffic stop would be supported by probable cause to believe that the driver had violated the law. The Fourth Amendment does not prohibit reasonable seizures.

level of police scrutiny nor to the same overall constraint on liberty as a passenger in a private automobile stopped under the same circumstances. See Pet. Br. 25-26; cf. *Wilson*, 519 U.S. at 413-15. Third, whereas an occupant in a private vehicle – given the individual's likely relationship to the driver – would certainly not feel free to leave the vehicle when stopped, a reasonable passenger on a common carrier who has no relation to the driver is certainly more likely to feel free to leave the scene and find an alternate route. Thus, there exists constitutionally and factually significant differences between a passenger stopped in a common carrier such as a bus or a taxi and passengers traveling in a private automobile.

2. Respondent also makes much of *California* v. *Hodari D.*, although that case too has no relevance here.[7] In *Hodari D.*, the defendant attempted to suppress evidence he discarded while fleeing the police, on the ground that he was subjected to an unreasonable seizure under the Fourth Amendment. This Court addressed the "narrow question" of whether "with respect to a show of authority . . . a seizure occurs even though the subject does not yield." *Hodari D.*, 499 U.S. at 626. Thus, at issue was whether the defendant was "seized" while being pursued by the police. The Court held that because the defendant did not comply with the officer's command to halt, he was not seized until the officer actually stopped the defendant's movement.

According to Respondents, *Hodari D.* is applicable here because we cannot know how and whether Petitioner, the passenger, responded to the Deputy's show of authority. See Resp. Br. at 25 ("[Petitioner's] choice to remain [in the vehicle] says nothing about whether the police action had

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[7] Unlike this case, *see* Pet. Br. 30, neither *Bostick* nor *Hodari D.* directly implicate concerns of officer safety. Respondent's brief nowhere contests Petitioner's argument that Respondent's position is contrary to this "weighty interest," *Wilson*, 519 U.S. at 413. *See* Pet. Br. 30.

compelled him to do so or whether he simply chose to remain where he had been, perhaps because it would be more convenient."). For example, Petitioner might have objected to pulling over, requested that the driver comply with the officer's show of authority and pull over, or perhaps even, hypothetically, "leap[t] from the car and immediately fled from the scene." *Id.* Under these circumstances, asserts Respondent, "[n]o one could reasonably argue that the passenger was 'seized' because she somehow had submitted to the show of authority." *Id.*

But the irrelevance of Petitioner's thoughts in the course of a traffic stop does not alter the reality that the direct cause of the interference with his liberty interests was the Deputy's show of authority in stopping the car. Nor is it sensible to suggest that a passenger who does *not* alight from the vehicle to continue on his or her way has not acquiesced to that show of authority, regardless of motive. In this respect, a passenger is no less an "object" of the officer's compulsion than the driver or the contents of the vehicle, even if the passenger is an unintended object. See *Brower*, 489 U.S. at 596. In essence, Respondent proposes a new rule for this Court, namely that a passenger can *never* "submit to a show of authority" when being pulled over by the police. See Resp. Br. at 24 ("It was not for petitioner to respond to the officer's show of authority in this case.").

Simply put, when a vehicle is pulled to the side of the road by a police officer, its occupants are detained. The subjective thoughts of the occupants or an express disagreement between the driver and passenger prior to pulling to the side of the road are of no consequence. As long as the passenger remains in the car, that individual has submitted to the officer's show of authority.

III. THE DIRECT AND UNATTENUATED RELATIONSHIP BETWEEN THE CONCEDEDLY UNLAWFUL STOP AND THE EVIDENCE OBTAINED DICTATES THAT SUPPRESSION OF THE EVIDENCE IS REQUIRED.

Despite Respondent's protestations to the contrary, see Resp. Br. 37-39; see also *Amicus* Br. in Supp. of Resp., Wayne County, Michigan at 3-10, because the Deputy exploited an unlawful detention that directly led to the seizure of evidence that otherwise would have gone undiscovered, the evidence must be suppressed. This result follows from this Court's analysis in *Hudson* v. *Michigan*, 126 S. Ct. 2159 (2006), which examined two factors in determining whether evidence obtained during an unlawful search or seizure should be suppressed. First is "the requirement of unattenuated causation," *id.* at 2165, under which the Court examines whether "the causal link between the constitutional violation and the discovery of the evidence is attenuated" or sufficiently direct. Pet. Br. 28. As part of this analysis, the Court considers whether "the interest protected by the constitutional guarantee that has been violated would [ ] be served by suppression of the evidence obtained." *Hudson*, 126 S. Ct. at 2164. Second, the Court weighs whether the "deterrence benefits" of excluding the evidence "outweigh its 'substantial social costs.'" *Id.* at 2165. From these two factors, it is clear that the Court should apply the exclusionary rule in a case such as this one, where the identification of Petitioner, the discovery of his parole status, and his subsequent arrest and search were all the *immediate and direct result* of the concededly unlawful traffic stop, and the deterrence benefits of excluding the evidence are clear and significant. Pet. Br. 27-28.

Rather than address *Hudson*'s multidimensional inquiry, however, Respondent instead focuses exclusively on the question of attenuation. It asserts that in order to determine "whether the 'taint' of primary illegality has been sufficiently

attenuated," the Court should look to three factors identified in *Brown* v. *Illinois*, 422 U.S. 590, 603-04 (1975). Resp. Br. 37-38. According to Respondent, these three factors are: "(1) the time between the illegal police conduct and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the police misconduct." *Id.* at 38.

The attenuation factors enumerated in *Brown*, however, apply only to circumstances where unlawful seizures result in *confessions*. As the *Brown* Court stated, each of its factors is designed to determine "whether [a] *confession* is obtained by exploitation of an illegal arrest." *Brown*, 422 U.S. at 603 (emphasis added). Moreover, Respondent omitted mention of a fourth factor expressly incorporated into *Brown*'s analysis: whether and in what context the authorities issued a *Miranda* warning to the suspect.[8] See *id.* (calling *Miranda* warnings "an important factor" in the analysis); see also *Kaupp* v. *Texas*, 538 U.S. 626, 632-33 (2003) (whether a confession "was 'an act of free will [sufficient] to purge the primary taint of the unlawful invasion'" depends upon "observance of *Miranda*, 'the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct'"). Respondent's creative attempt to graft its selected portions of the *Brown* test onto the *Hudson* analysis should be rejected.

Brown's four-factor test stems primarily from *Wong Sun* v. *United States*, 371 U.S. 471, 486, 488 (1963), where the Court held that a statement following an illegal arrest must be suppressed as a "fruit" of the arrest unless it results from "an intervening independent act of a free will," and is

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[8] Respondent also fails to discuss the other important attenuation factor identified in *Hudson* and noted above, whether "the interest protected by the constitutional guarantee that has been violated would [ ] be served by suppression of the evidence obtained." *Hudson*, 126 S. Ct. at 2164.

"sufficiently an act of free will to purge the primary taint of the unlawful invasion." Put differently, "the issue is whether the speaker has voluntarily chosen to make the later statement, uninfluenced by the fact that prior statements have been compelled." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 279 (1983). This analysis reflects a specific concern in the exclusionary rule context over the interplay between the Fourth Amendment right against unreasonable searches and seizures and the Fifth Amendment right against compelled self-incrimination. See *Brown*, 422 U.S. at 601 (noting that while the two Amendments "may appear to coalesce[,] . . . . [t]he exclusionary rule, however, when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth"); see also *Taylor* v. *Alabama*, 457 U.S. 687, 690 (1982). For "even if . . . statements . . . [a]re found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains." *Brown*, 422 U.S. at 601.

Ultimately, *Brown* was concerned with the effect of an unlawful arrest on the defendant's free will, *i.e.*, whether the arrest served as a cause in his decision to confess. In a case such as this one, where no confession is involved, however, the effect of the unlawful seizure upon the defendant's free will plays no role in the discovery of evidence in a search incident to arrest pursuant to an active warrant discovered during an illegal stop. The current scenario bears little resemblance to that of a defendant who confesses for reasons that may be attenuated from the illegality of the stop. In other words, a defendant's decision to confess – and thus the *potential* for events prior to that confession to serve as an intervening cause – has no parallel in a case like this one, where at issue is the acquisition of physical evidence in a search incident to arrest.

Even assuming, *arguendo*, that *Brown* applies outside of the confession context, the three factors identified by Respondent nevertheless weigh heavily in favor of

suppression. First, as Respondent concedes, "the evidence was discovered close in time to the allegedly unlawful passenger detention." Resp. Br. 38. Second, there were no "intervening circumstances" between the seizure and the search. Such intervening circumstances occur when, for example, the discovery of the evidence in question was wholly incidental and independent of the allegedly unlawful arrest. For example, in *Mosby* v. *Senkowski*, 470 F.3d 515, 522 (2d Cir. 2006), the Second Circuit found that an intervening circumstance occurred when, while police were arresting defendant, a passerby asked what was happening with "Florida." The association of the defendant with that nickname implicated defendant in an entirely separate crime than the one for which defendant was being arrested.

Some courts have asserted that the subsequent discovery of an active arrest warrant constitutes an intervening circumstance. For example, the Seventh Circuit has claimed that "[b]ecause the [subsequent] arrest [on the outstanding warrant] is lawful, a search incident to the arrest is also lawful." *United States* v. *Green*, 111 F.3d 515, 521 (7th Cir. 1997). The *Green* court recognized, however, that there was "no case law directly on point," but asserted that other cases "are closely analogous and support our conclusion." *Id.*

A closer look at the underlying cases noted by *Green* tell a different story. For example, in *United States* v. *Nooks*, 446 F.2d 1283 (5th Cir. 1971), the Fifth Circuit did not rely solely or even primarily on an active arrest warrant in holding that the nexus between the challenged search and the original arrest was "attenuated." Rather, the court relied on the fact that the defendant: "precipitately and forcibly attempted to escape from [the officer's] custody and fled driving at speeds up to 115 m.p.h."; "shot directly at [the officer]"; and had "two other men in the trunk of the automobile." *Id.* at 1287-88. The other two cases cited by *Green*, *United States* v. *Dawdy*, 46 F.3d 1427 (8th Cir. 1995), and *United States* v. *Bailey*, 691 F.2d 1009 (11th Cir. 1982), are similarly

inapposite. Both involved defendants who *resisted* arrests, and both found that their defiance "provided independent grounds for . . . arrest" thus rendering "the evidence discovered in the subsequent searches . . . admissible." *Dawdy*, 46 F.3d at 1431; see *Bailey*, 691 F.2d at 1018.

Not only are these cases distinguishable on the facts, but those divergent facts give rise to discrete policy concerns that do not arise in cases where the alleged intervening factor is limited to the discovery of an active warrant. As Petitioner previously pointed out, see Pet. Br. 30, if the evidence in Petitioner's case is permitted to be used by the State, officers would no longer have sufficient incentive to avoid unjustified stops and random checks of passengers in vehicles. Indeed, such a holding may encourage officers to pull vehicles over to check for passengers with outstanding warrants on a mere "hunch." See *Amici* Br. in Supp. of Pet'r, the American Civil Liberties Union at 12-13; cf. *United States* v. *Arvizu*, 534 U.S. 266, 274 (2002). Longstanding case law would otherwise prohibit such action, *Terry* v. *Ohio*, 392 U.S. 1, 27 (1968), but Respondent's position would significantly undercut that prohibition. Officers could now be rewarded for pulling over vehicles with the exclusive purpose of inquiring whether any of the passengers had outstanding warrants. In contrast, no officer patrolling the streets would, for example, change his or her behavior as a result of the *Nooks*, *Dawdy*, or *Bailey* decisions regarding the intervening circumstance of resisting arrest. Because there is simply no way to predict who might resist arrest and thus its occurrence is merely happenstance, officers will not similarly be encouraged to pursue unreasonable searches and seizures as a result.

Under the final *Brown* factor, the actions of the Deputy in this instance undoubtedly constituted "flagrant misconduct as to require prophylactic exclusion." *Rawlings* v. *Kentucky*, 448 U.S. 98, 110 (1980). Despite Respondent's repeated attempts to characterize the traffic stop at issue as "routine," see, *e.g.*, Resp. Br. 5, 7, 18, the record makes clear that the

Deputy pulled over the vehicle in which Petitioner was a passenger without any reasonable suspicion that any of its occupants had violated the law and in the face of information indicating that his purported reason for making the stop was incorrect. It is well understood that police may stop a vehicle on a public street or highway when officers have *probable cause* to believe that someone in the vehicle has committed a public offense, even if that offense is simply a minor traffic offense, *Whren* v. *United States*, 517 U.S. 806, 817-19 (1996). But,

> except in [such] situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

Prouse, 440 U.S. at 663.

Beyond the basic unreasonableness of the stop, this matter in fact presents a paradigmatic case of flagrancy because the Deputy took action in the face of contrary information he received *before* the stop. The Deputy's *post hoc* explanation – his need to check whether the valid temporary operating permit in fact belonged to that car – should have been dispelled when the dispatcher informed him that there was a pending permit application – necessitating a temporary permit – for that very car. At a minimum, this was not a case where the unreasonableness of the stop became apparent only after the fact, as with a misread license plate or confusion about whether car was in proper operating condition. Once the Deputy learned of the pending permit application and spotted the temporary operating permit, he no longer had any reasonable suspicion of wrongdoing insofar as the driver's right to operate the vehicle was concerned. Thus, the Deputy's actions appear to be analogous to those cases where

this Court has deemed police conduct flagrant because the purpose of the seizure was "'in the hope that something might turn up.'" *Barry* v. *New Jersey*, 454 U.S. 1017, 1021 (1981) (quoting *Brown*, 422 U.S. at 605)).

In sum, where as here, there was no "articulable and reasonable suspicion" of any wrongdoing on the part of the vehicle's occupants, the stop was anything but "routine." There can be no doubt that this stop was an unreasonable action taken in the face of contrary information already received by the Deputy. The supposed "routine" execution of such a stop therefore fails to purge the primary taint.

CONCLUSION

The decision of the California Supreme Court should be reversed, the sentence vacated, and the case remanded to the California Supreme Court with a direction to exclude the evidence uncovered as a result of the traffic stop.

Respectfully submitted,

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